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No. 82-6108

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GARY X. NELSON,

Petitioner,

v.

WALTER D. ZANT, Warden, Georgia Diagnostic & Classification Center,

Respondent.

PETITIONER'S REPLY

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TABLE OF AUTHORITIES

Cases:

Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other grounds, Green v. Georgia, 442 U.S. 95 (1979) 3

Jackson v. Virginia, 443 U.S. 307 (1979) 2

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Statutes:

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PETITIONER'S REPLY

Petitioner Gary X. Nelson submits this reply to Respondent's Brief in Opposition to the Petition for Certiorari.

1. Respondent mischaracterizes the issue presented in this case by asserting that Petitioner seeks review of "the sufficiency of the evidence supporting Petitioner's convictions" for murder, aggravated sodomy and rape. (Br. in Opp., p. 8). The general sufficiency of

the evidence was not in issue in either of the courts below and is not in issue here.* The principal issue presented by this Petition is whether there was sufficient evidence of record, under the standard of Jackson v. Virginia, 443 U.S. 307 (1979), to establish one element of the state's case-in-chief against Petitioner: Because the state's weak circumstantial evidence implicated both Petitioner and his one-time roommate, Alphonso Swinton, it was necessary for the state to negate, by evidence of record and beyond a reasonable doubt, that Alphonso Swinton committed the crimes. See Jackson v. Virginia, supra; Vachon v. New Hampshire, 414 U.S. 478 (1974); Ga. Code Ann. §§ 24-4-7;** Petition, pp. 14-16. There is no dispute here that the state was required, under Georgia law, to meet that burden with respect to Swinton. See Br. in Opp., pp. 8-9.***

2. The Petition establishes that the "proved facts" relied on by the Georgia Supreme Court in Nelson II do not

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* Indeed, the general sufficiency of the evidence to support Mr. Nelson's convictions is one of the issues that has been expressly reserved should further proceedings be required on Mr. Nelson's petition for habeas corpus in the Georgia courts. See, Petition p. 5.

** Ga. Code Ann. §§24-4-6 and 24-4-7 (formerly Ga. Code Ann. §§ 38-110 and 38-111) are quoted in full at p. 16, n.** of the Petition.

*** The Georgia circumstantial evidence statute provides that the record must be reviewed for "proved facts" which "shall exclude every other reasonable hypothesis save that of the guilt of the accused." As specifically applied in this case by the Georgia Supreme Court's holding below, this statute required review of the record to determine "whether there is sufficient evidence to support the jury's finding that the state had excluded the hypothesis that Swinton could have committed the murder." Zant v. Nelson, 250 Ga. 152, 154 (1982).

satisfy that standard, and that the Swinton hair sample, which the Court conceded had never in fact been introduced by the prosecutor at trial, was in fact the only "evidence" which could have satisfied the state's burden to negate Swinton. All of the judges connected with this case from trial through the present proceedings have recognized that the state's circumstantial case implicated both Swinton and the Petitioner. The prosecutor's plan at trial was to attempt to carry his burden of negating Swinton by introducing hair evidence, directed at Swinton and Swinton alone. For some reason, the hair "evidence" was never introduced. No amount of re-review of the evidence that was in fact introduced can supply the missing part of the state's case against Petitioner -- the utter lack of proof excluding Swinton.

3. Respondent's rehearsal of other evidence relating solely to Petitioner is simply beside the point because it does nothing to negate the reasonable hypothesis that Swinton was the perpetrator. Cf. Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978) (prosecution had duty to rebut reasonable hypothesis that defendant had stolen change allegedly linking him to the murder from an individual named by the defendant and discharged its duty by introducing that individual's testimony), rev'd on other grounds, Green v. Georgia, 442 U.S. 95 (1979). Nor can the state supply this missing proof by suggesting, in its Brief in Opposition, that the circumstantial evidence against Petitioner was strong. Aside from the fact that the circumstantial evidence here was extremely weak, such an argument is tantamount to claiming that a powerful circumstantial case renders the Georgia

circumstantial evidence statute inapplicable. All of the state courts which have considered Petitioner's case have specifically held that that statute applied here with full force to require the exclusion of Swinton.

4. The narrow issue presented on this Petition has been fully litigated in the state habeas corpus proceedings below. The facts and the law are clear; indeed, they are not in substantial dispute. We submit that this case is appropriate for summary reversal of the convictions by this Court by means of a per curiam opinion such as that issued below by Judge Crumbley, of the Superior Court of Butts County, Georgia, who granted Petitioner's application for a writ of habeas corpus.

Dated: March 12, 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this Reply Brief upon respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first-class postage prepaid, addressed to:

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Done this 12th day of March, 1983.

Richard H. Sayler, Esq.